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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SCHRIBER-SCHROTH COMPANY, Petitioner,
vs.
THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.
No. [redacted] 9

THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner,
vs.
THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.
No. [redacted] 10

THE F. E. ROWE SALES COMPANY, Petitioner,
vs.
THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.
No. [redacted] 11

PETITIONERS' REPLY TO BRIEF FOR PLAINTIFFS-RESPONDENTS ON PETITION FOR WRITS OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SCHRIBER-SCHROTH COMPANY, Petitioner, vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.	No. 650.
THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner, vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.	No. 651.
THE F. E. ROWE SALES COMPANY, Petitioner, vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.	No. 652.

PETITIONERS' REPLY TO BRIEF FOR PLAINTIFFS-RESPONDENTS ON PETITION FOR WRITS OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is not an ordinary patent case as, were the cases cited in the brief of Plaintiffs-Respondents, page 1. The questions involve the construction of the Patent Statutes,

R. S. 4888 and R. S. 4886, and of the injunction statute of the United States Code. The petition presents not only the question of doubtful validity, but a question of sufficiency of claiming as distinguished from a sufficiency of disclosures and claiming as in this Court's previous decision in this case.

That this Court should not have to review causes when all the lower Courts had concurred* like those cited, page 2, Plaintiff's** Brief, merely because there is concentration of automobile industry in the Sixth Circuit is recognized. But where, as in the instant cases, there has been such disagreement, as well as indecision, review by this Court is deserving.

Defendants' Petition for Writ of Certiorari presents only the matter of the Jardine patent. This patent was held invalid by the Master, whose report was confirmed by the District Court; in its first consideration, the Court of Appeals dismissed as to this patent without prejudice; and at the instance of Plaintiff a decree was entered in the District Court dismissing as to it without prejudice. Thereafter, this Court remanded the causes to the Court of Appeals. In Plaintiff's fifty-one page Brief upon the remand, but two and one-half pages were devoted to the Jardine patent; but in its Reply Brief the Jardine patent was made the spearhead of its attack. At the oral argument in the Court below, not one word was said by Plaintiff's Counsel anent the Jardine patent in the opening argument, and, according to custom, Defendants' Counsel limited their statements to answering the arguments of Plaintiff's Counsel; but thereafter Plaintiff's Counsel, in his closing argument, made the Jardine patent again the

*In one of the cited cases, Dayton Rubber Mfg. Co. et al. v. Stagnaro, 307 U. S. 627, validity was conceded (see 101 F. [2] 808, l. c. 809).

**We herein refer to Respondent, the Cleveland Trust Company, as Plaintiff; and to the Petitioners in these cases as Defendants.

spearhead of his attack, and was heard by the Court, notwithstanding the objection of Defendants' Counsel.

Carbice Corp. v. American Patents Corp., 283 U. S. 27 and 420, involved a situation comparable to that presented here. This Court granted Certiorari, even though there was no conflict of decisions between Circuit Courts of Appeals, apparently because a new question of patent law was involved and this Court's first decision was limited to such a question, 283 U. S. 27. Thereafter in view of the circumstances stated in this Court's decision, 283 U. S. 420, this Court entertained a petition for further consideration on the question of the validity of the patent over the prior art and held the patent invalid.

In this case the suit was on five patents, namely, the Gulick, Maynard, Jardine, Mooers and Schmiedeknecht patents, all of which were found invalid by the Master and the District Court. The Court of Appeals only passed on the validity of the Gulick and Maynard patents and dismissed as to the others. This Court then reversed the Circuit Court of Appeals as to the Gulick and Maynard patents. The Court of Appeals, after holding the Gulick, Maynard, Schmiedeknecht and Mooers patents invalid over the prior art, practically substituted the Jardine patent for the Maynard patent, by assigning to it the same distinction over the prior art as had been assigned to the Gulick patent, and held it infringed by the same piston, Exhibit 1, which had previously been held to infringe the Gulick patent. In this case there is more reason for this Court to pass upon the validity of the Jardine patent than there was in the Carbice Case, because here the Court of Appeals has misinterpreted and unduly limited the decision of this Court in this same case and certainly the decision of this Court in Permutit v. Graver, 284 U. S. 52, which was extended and applied by this Court in this case.

With reference to the possibility of litigation in other Circuits, it is observed that Counsel are now "informed and believe," that The Cleveland Trust Company is registered in states outside the Sixth Circuit. While Respondent may be registered in foreign states at this time, being a banking corporation and therefore having no occasion, *bona fide*, to do business in foreign states, it is within Respondent's power to withdraw such foreign registration if this Court should not grant Certiorari. Thereafter the public would be in the same position as if Respondent had never registered in a foreign state.

THE QUESTIONS INVOLVED.

The questions involved here are not those listed under "bad law" in Plaintiffs-Respondents' Brief, pages 7-8.

Question I.

Defendants-Petitioners' question I is not simply whether a claim should be read in the light of the specifications, or whether a characteristic of an element can be read into it; the question is much more narrow, namely, whether

> a feature, found by the Court of Appeals to be an essential element of the patent, in order to hold it valid over the prior art, can be read into the claim by reference to the specification, where that feature was once included in the claims presented by the applicant but excluded from claims as finally issued, after adverse decisions in interferences on claims including such a feature.

That the Court of Appeals found the thing which distinguished the Jardine patent from the prior art to reside in "flexing webs," is clear not only from that court's second decision, but also from its first decision; and it will be noted that Plaintiffs-Respondents' position in that regard is the same as was taken before this Court on Peti-

tioners-Defendants' previous petition and before the Court of Appeals after this Court had so construed the Court of Appeals' first decision.

The first decision of the Court of Appeals found the feature which distinguished the Gulick patent from the prior art to reside in "webs laterally flexible" (p. 6) and found Jardine's contribution to reside in the "flexible web" (p. 11). This Court so regarded the Court of Appeals' view as to the Gulick patent (pp. 5, 10), but held there was no such disclosure in the original Gulick application. The Court of Appeals in its second decision, after affirming that "Gulick's basic concept * * * as we then considered it was of balanced flexibility derived from interplay of yielding skirt periphery and **flexing** supporting webs," and that the patent could not now be so considered, said (pp. 4, 5):

> "This is not the combination we held to be valid. It is not the combination to which those most captious and skilled in the industry gave tribute, to the end that all our doubt as to validity was resolved. We are constrained to hold all of the claims in suit of Gulick invalid as marking no inventive step over prior art."

Although the Court of Appeals in its first decision had said (p. 11) that "Jardine was without substantial commercial recognition and none of the accused devices are slipper pistons," proceeded in its second decision (p. 5) upon the basis that

> "Jardine with great clarity and in precise detail explains the principle of operation of his machine and the **flexibility** of its webs. The knowledge that was not Gulick's or was by him concealed, is clear to Jardine and by him proclaimed."

The Court of Appeals, after considering the Jardine description, including "**bending** of the webs," and then considering the claims, distinctly said (p. 6):

> "While the specimen claims of Jardine, 1, 8, and 11, though reciting the web as an element do not incorporate therein the property of **flexibility**, yet in the light of the description they must be so interpreted."

The Court of Appeals then found those claims valid, and stated (p. 9):

> "Our conclusion in this respect is based upon the concept of a combination with balanced skirt flexibility due to co-operation of longitudinal and vertical slotting with **flexing webs** supporting retracted bosses and connected to a skirt thereby made responsive to physical compression and thermal expansion so as to permit of minute clearances between piston and cylinder, a concept perceived in Gulick as amended and minus amendment no longer perceived."

The Court of Appeals in coming to its conclusion of the validity of the Jardine claims by reading into them "flexing webs" did not consider the question here presented, namely, that not only do the claims fail to mention that feature, but that that feature, once included in claims presented by Jardine, was excluded from claims as finally issued after adverse decision in interferences on claims including such feature, although that question was strenuously argued by Petitioners-Defendants before that court. Accordingly, in reading that feature into the claims the Court of Appeals not only misinterpreted, but unduly limited this Court's decision in this case and in other cases cited in the Petition of Defendants.

Plaintiffs-Respondents in their brief (p. 30) seek to distinguish from **Permutit v. Graver Corp.**, 284 U. S. 52, and more particularly the passage quoted in Petitioners-Defend-

ants' brief (p. 16), by the fact that in the patent involved in Permutit v. Graver there was neither description nor claim; however, the passage quoted is based upon the **claim requirement** of R. S. 4888, and that such was the view of this Court is apparent from this Court's statement, "**or** a failure to claim it" (284 U. S. 60), and this Court refers in a footnote to **McCarty v. Lehigh Valley R. R. Co.**, 160 U. S. 110, 116, cited in Defendants-Petitioners' brief (p. 15).

Again, in this case (dec. p. 10) this Court stresses that both the specification and claim requirements of R. S. 4888 must be complied with when this Court said:

> "We concluded that the court below erred in giving any effect to so much of the Gulick patent as by amendment describes **or claims** the flexible webs, and in treating any of the specifications **or claims** in Gulick and Maynard as referring to such webs."

In this case the Court of Appeals has not only departed from the decisions of this Court, but from a previous decision of the Court of Appeals for the Sixth Circuit, namely, **Wm. B. Schaife & Sons v. Falls City Woolen Mills Co.**, 209 F. 210, where Judge Denison, after stating the general rule that ordinarily a claim should be construed in connection with the specification, states the exception as follows (l. c. 213):

> "But where, from the specification or the **history of the application** or the language of the claim it is clear that the patentee intended to claim and the Patent Office intended to grant the broader monopoly which turns out to be invalid, the courts will not, for the arbitrary purpose of saving the claim, read into it a limitation which it does not have."*

*Judge Denison cites McCarty v. Lehigh Valley R. R., 160 U. S. 110, 116, and Stearns v. Russell, 85 F. 218, 224, C. C. A. 6, in which the decision was by the later Chief Justice Taft, with whom sat the later Justice Lurton.

What is referred to in Plaintiffs-Respondents' brief (p. 7) as the "contract rule" does not permit what the Court of Appeals did in this case, because, in accordance with the contract rule, as stated by the late Judge Sanborn in **National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.**, 106 F. 693, 701:

> "Prior negotiations are merged in the contract, and, while they may be considered to interpret its purpose, they must not be permitted to contradict or modify its express meaning."

In this case the "prior negotiations," i. e., "the history of the application" in the Patent Office, and "the language of the claim," makes it "clear that the patentee intended to claim and the Patent Office intended to grant the broader monopoly which turns out to be invalid."

The extended discussion, beginning page 11 of Plaintiffs-Respondents' brief with reference to the interferences in which Long and Jardine were involved, is a specious quibble. For example, at page 13 counsel say, in effect, that there was no decision between Long and Jardine on the issue of flexible webs, whereas the record shows (R. 2092) that that issue was involved in synonymous language, "resilient joining means," in Interference 49,581 (R. 2090-3). While this was a three-party interference, and the interference papers in the record merely show that the award of priority was adverse to Jardine, reference to claim 5 of the Long patent No. 1,872,772 (R. 1735) shows affirmatively that Long prevailed. In our presentation of the flexible web matter we have been cognizant of the fact that in the record many synonymous expressions were used, but whether the interferences were contested on one form of phraseology or another makes no difference in the ultimate outcome. **Jardine never at any time upon any issue prevailed over Long.** But whether the interferences were with Gulick, Long or Hartog, or any or all of them, on

claims involving flexing webs, the fact is that such claims were canceled by Jardine after adverse decisions in the interferences.

In the footnote in Defendants' Petition (p. 5) we have listed the interferences. The claims of the Jardine application which were involved in these interferences are found in Vol. IV of the Record (pages 2034, 2060, and 2066-2068). They relate to the interferences as follows:

Interference	Jardine Claims
49570 (R. 2071-3)	15. **16E** (R. 2067)
49572 (R. 2076-8)	19. **20E** (R. 2068)
49578 (R. 2086-8)	18. **19E** (R. 2067)
49579 (R. 2088-90)	17. **18E** (R. 2067)
49581 (R. 2090-3)	20. **21E** (R. 2068)
49583 (R. 2094-6)	21. **22E** (R. 2068)
49590 (R. 2098-2100)	1. (R. 2034)
	11. (R. 2060)

Each and every one of the claims in the Interferences, except 49590, involved flexible webs by various names. The claims in Int. 49590 were structure claims which Jardine lost to Long, and they are claims 6 and 7 of the Long patent No. 1,872,772 (R. 1735). Likewise, claim 13. **14E** (R. 2066) involved in Int. 49576 (R. 2081-3) was lost by Jardine, and this claim not only specifies "the skirt portion being split longitudinally of the piston to permit free expansion and contraction," but, furthermore, "the skirt portion being cut away adjacent the outer ends of the piston bosses," which latter is put forward as a characteristic of the Jardine piston and of Exhibit 1 held to infringe the Jardine patent.

None of the claims of the Jardine patent (absent flexing webs) are valid over the prior art, even if Long is excluded. The Court of Appeals in the second decision (pp. 4-5) decided that the Gulick and Maynard patents were not valid,

absent flexing webs, and then construed the Jardine patent as covering what it had previously conceived was covered by Gulick (pp. 5, 9). In its first decision (p. 11) the Court of Appeals considered that "whatever Jardine contributed to the art, if anything, is said to be incorporated in Maynard." Surely, then, if the Gulick and Maynard patents are invalid as "marking no inventive step over the prior art," then Jardine, which is between those two, must clearly be invalid, absent flexing webs.* The Court of Appeals clearly came to that conclusion, and, therefore, found it necessary to read into the Jardine patent the feature of flexing webs; that was not permissible under the circumstances of this case.

The Court of Appeals obviously felt that flexibility in the webs was an essential feature of the combination. Whether it occupied the station of a mere characteristic, or the station of an element, is of secondary importance; the prime consideration being that feature was one which Jardine had contested with other parties in the Patent Office and lost at every turn; and the point which we present to this Court is that, be it characteristic or element, can an invalid patent claim be made valid by interpreting into it a feature which had been adjudicated to be the invention of someone other than the patentee, and which the patentee forthwith surrendered in the Patent Office?

Question II.

Defendants-petitioners' question II is not simply whether a different rule of interpretation for the prior art

*Reference is had to Appendix D in brief of Defendants-Respondents in Nos. 653, 654 and 655, which contains brief statements of what this Court and the Court of Appeals have said about the Spillman & Mooers and Franquist patents in connection with the Gulick patent, and about the Schmiedeknecht patent in connection with the Maynard patent, together with illustrations of those patents. While the Spillman & Mooers patent does not disclose a relief, the Franquist patent clearly disclosed one, and the Schmiedeknecht patent disclosed the very relief and webs used in the Maynard patent and in Exhibit 1, said to infringe the Jardine patent.

and for a patent in suit is to be followed, or whether a prior use should be proved by evidence which is clear and convincing and even beyond reasonable doubt, or even whether the sufficiency of disclosures of prior patents, publications, and prior uses should be the same. The question is much more narrow, namely, whether

> a prior use should be disregarded even though proved as to time and structure, unless an element thereof was "known to have the quality" assigned to it by the patent in suit, or whether that was "then understood,"

which are the very words used by the Court of Appeals in its second decision (p. 8).

That is the ground on which the Court of Appeals decided the validity of the Jardine patent over the Long pistons. The existence of these Long pistons prior to Jardine's filing date was not disputed by the Court of Appeals; indeed, it could not be in view of their identification, not only by defendant's witnesses, but by witnesses called by plaintiff, as shown in our Petition. Of course, during the trial prime emphasis was placed on the Gulick patent with its filing date of November 20, 1917, and the purpose of the witnesses called by Plaintiff was primarily to show that Long did not have a successful piston before that date. It was, therefore, not important to Plaintiff at that time whether there was proof of these Long pistons between November, 1917, and March, 1920, when Jardine filed.

The Court of Appeals evidently found the Long pistons proved as to date and as to structure prior to Jardine, and therefore based its conclusion upon a ground contrary to this Court's decisions. But Plaintiffs-Respondents stated in their brief (p. 24) that the Court of Appeals found it

unnecessary to examine the record on the question of whether the dates of these pistons and their structure had been established. The answer to that is that the Court of Appeals had the record before it, and the fact is that the only ground upon which the decision is based is that web flexibility was "not then understood" and that the Long webs "were (not) known to have that quality." Such requirement of a prior use, clearly established, is contrary to the decisions of this Court.

Plaintiffs-Respondents' counsel have confused the Long patents with the Long pistons in use prior to the filing of the Jardine application. Long, like De Forest,* may have been ignorant of the fact that his pistons had flexible webs; but Petitioners-Defendants are not relying on any Long patent or on what Long knew, but are relying on the pistons (Exhibits E, F, G and R), proved to have been in existence prior to Jardine's filing date, whether made by Long, Weems, or Franklin Motor Company. These pistons are before the Court; their dates have been proved not only by defendants' witnesses, but by witnesses called for and vouched for by plaintiff; yes, even Jeffries admitted he saw them in 1920. That is why the Court of Appeals did not question their dates.

The treatment of Jeffries' fatal admission by Plaintiffs-Respondents' counsel borders on the finesse. We want to repeat here what Jeffries testified (R. 1009-10):

> "Q. What do you say; do you think the webs **weren't flexible enough?** You have the piston before you, so you ought to be able to tell something about it.
> A. No, there is flexibility in the webs."

The question was not whether these webs were "flexible," but whether they were "flexible enough." The double

*De Forest v. General Electric, 283 U. S. 664, 686, cited in Petitioner's Brief, p. 18.

negative, "weren't" and "no," makes the answer "yes," that they were flexible enough, which obviously meant flexible enough when the piston was used in the cylinder of an automobile. The Court of Appeals obviously so understood it, and there is no real answer by Respondent to that except the possibility that there might be rubbing at the ends of the web. That is, however, characteristic of all these web pistons, and that is why we find the "Keystone relief" on Exhibit 1.

The plaudits which Plaintiff accords Jardine at page 9 et seq. of its Brief, are merely the echo of the puffing which Plaintiff did for Gulick when the case was here before.*

Applause of the Jardine patent as solving the problem, that it enabled .002 inch clearance and that it has gone into use by the millions, is absurd in the light of the finding by the Court of Appeals in its first decision (p. 11) "Jardine was without substantial commercial recognition and none of the accused devices are slipper pistons" and the admission of Plaintiffs-Respondents' witness, Jeffries, that the Jardine patent was subject to oil pumping (R. 145).

Reverting to the matter of rubbing at the webs, we have this interesting situation: It was attempted to place upon the market a piston like the Maynard piston, but without the Keystone relief, and Exhibit 21 (R. 1337) was proffered by plaintiff as a structure showing Jardine as well as Maynard. Jeffries admitted on cross-examination (R. 1045) that his previous statement (R. 178) of extensive use was based upon hearsay, for he admitted that he never installed or even saw such a piston, but saw only drawings; he did not even know whether any such piston ran for one hundred miles (R. 1046). Further, on cross-examination Jeffries produced unfinished castings (Exhibits

*And, indeed, of the same character as Plaintiff's acclaim for the Fronquist patent, before it expired.

3-M and 3-N), which admittedly did not have that Keystone relief (R. 135). On redirect examination (R. 189) Jeffries then produced drawings (Exhibits 21 and 22, R. 1337-40). Of these, only Exhibit 22 shows the Keystone relief, but it also shows the notation "their wire" (evidently Oakland's), that the Keystone relief was "added" February 10, 1925, namely, five years after the filing of the Jardine application.

As to clearances, there is not a word of evidence in the record that the Jardine piston ever operated in any engine at a clearance of .002 inch. No Jardine piston ever went into commercial use, and neither a Jardine piston nor a piston like Exhibit 1 was ever used in a Franklin air-cooled engine, as was the Long piston. And the Long piston was replaced not by a Jardine piston or a piston like Exhibit 1, but by a steel strut piston (Exhibit AA), which is something entirely different.

Plaintiff raises the inference, on page 14 of its brief, that Defendants should have called Long as a witness. Obviously, if Plaintiff had thought the testimony of Mr. Long would have favorably affected the record from its viewpoint, he would have been called to testify as Plaintiffs' witness, as the Record shows (R. 290) that Long and Plaintiffs were in concert.

The only uncertainty in the Long proofs before the Patent Office Tribunals, was an uncertainty as to whether Long had made the piston in question before Gulick filed in 1917. This is what the Examiner was discussing at Record 1535 and would have been plain if Counsel had completed the third sentence in the quotation at Brief, page 14. Never, at any time, was there any uncertainty with reference to the existence of Long's piston in 1918.

Finally, at page 29 of their Brief, Counsel says that none of Jardine's claims "depends for its patentability upon the fact that its web may yield or bend a trifle." If this

is so, the Court of Appeals was clearly misled, as indicated by the special pains it took to find that Long failed to invalidate Jardine, because Long did not understand that his webs were flexible. The Court of Appeals did not deny that Long was prior to Jardine as to every feature other than flexibility, and obviously, if it had not thought that flexibility had something to do with it, the Jardine claims would have been held invalid over Long.

We ask this Court to make no new rule of law as to standards of disclosure. That there is a difference in standards of disclosure is established by statute, and has been followed by the decisions of this Court, as cited in our petition.

For example, it cannot be denied that if, prior to March, 1920, some one familiar with the Ricardo piston (described in "The Automobile Engineer," October, 1918, R. 1647, Figure 2) had caused to be printed a sentence such as

"Slit the skirt of the Ricardo piston,"

that would have constituted a full and complete anticipation of the Jardine patent. The piston shown in the Jardine patent was described in the publication above mentioned (R. 1647) in all of its intricate detail, save for slitting a skirt; which feature, as this Court found in its previous decision, Page 4, was well known.

The sentence above suggested, while completely adequate as an anticipation under R. S. 4886, would be a far cry from providing the written description of the invention, and of the manner and process of making, constructing, compounding, and using it, and explaining the principle thereof, and the best mode of applying the principle as required by R. S. 4888.

Question III. With Reference to Injunctive Relief.

Whether the Aluminum Company of America is an exclusive or a nonexclusive licensee has no relation to the

point presented under III of the Petition. The proposition is that one cannot have an injunction to restrain a trespass upon a right which he does not own.

Plaintiff confuses the proposition which we presented to the Master, and the proposition which is presented here. We urged the Master to hold, as to the Jardine patent, that Plaintiff The Cleveland Trust Company did not have complete title (R. 1112); and we also urged the Master to hold that the Aluminum Company of America was an exclusive licensee, and as such an indispensable party to these suits, but the Master ruled that the Trust Company held the entire right, title and interest, and that the Aluminum Company of America was a nonexclusive licensee, hence not a necessary party to the suit (R. 1105, 1106).

The proposition presented here does not challenge the correctness of the Master's finding in any way. Notwithstanding that the Trust Company may own the entire right, title and interest in the Jardine patent, so that it may maintain suit thereon, and notwithstanding that the Aluminum Company of America is a nonexclusive licensee, Plaintiff is not entitled to any injunction under the Jardine patent, because it does not now have, and never has had, a right to do under the Jardine patent what Defendants are charged with doing. The only thing which Plaintiff retained unto itself was the right to make, use and sell, and to license others to make, use and sell, pistons made entirely of cast iron and steel. The rights which Defendants have been held to have trespassed upon involve aluminum pistons, and hence Plaintiff has suffered no trespass which entitles it to an injunction.

The Patent Pool.

The brief of Plaintiffs-Respondents states (p. 3) "hard cases should not make bad law," that (p. 7) "bad law

would result from the proposals" of Petitioners-Defendants, and that (p. 38) "it is unwise to make the bad law which Defendants ask." Petitioners-Respondents do not ask this Court to make "bad law," but rather the reverse, and to settle the law if it has not been settled.

Defendants-Petitioners did not "parade" the Aluminum Company of America and the patent pool, but the Petition mentions the agreements involving the Aluminum Company of America only as a basis of presentation for Question III. There was, therefore, no occasion for the nearly four pages of alleged reply, pages 3 to 7, which is mainly taken up with the virtues of the patent pool. However, since the matter was brought up by Plaintiffs-Respondents we deem it proper to reply and point out the dangers and abuses of a patent pool as shown by the proceedings in this case, which show the following:

1. Formation of the patent pool under a Trust Agreement, R. 1385, including the Spillman and Mooers, Franquist, Schmiedeknecht, Moores and later Gulick, Maynard and Jardine patents.

2. Amendment of the Gulick patent application, nearly five years after it was filed and over five years after the Long piston had appeared on the market.

3. Reliance upon the Spillman and Mooers and Franquist patents as pioneers, R. 1120-1123, 2299; issue of licenses thereunder, R. 1381, 1408, 1414; collection of royalties thereunder, R. 102, 2299; suits brought thereunder, R. 101, 2299; judgments recovered thereunder, R. 1341; even as to pistons exemplified by Exhibit 1 held by the Court of Appeals as infringing the Jardine patent.

4. After the Spillman and Mooers and Franquist patents had expired they were renounced by Plaintiffs-Respondents and denounced, R. 99-100, 107, 109, 177, 247, by Respond-

ents' expert as inflexible and unsuited for aluminum construction.

5. Reliance upon the Gulick patent as the prime solution of the problem with Jardine relegated to the background, causing the Court of Appeals to say in its first decision "Jardine was without commercial recognition."

6. Primary reliance upon Jardine after this Court's decision holding the Gulick and Maynard patents invalid.

A patent pool may have its compensation—for members of the pool—but it is not a healthy thing in our patent system, which has for its object "to promote the progress and the science of the useful arts by securing to * * * inventors the exclusive right to their * * * discoveries." Such a patent pool is certainly susceptible of manipulation, as illustrated by this case, so that successive patents may be put forward as those preceding them expire, and industry is compelled to defend a succession of assaults for the same thing.

The factors enumerated on pages 4, 5, and 6 of Plaintiff's Brief with reference to pooling, emphasize why it is important for this Court to zealously protect defendants from the ravages of patentees *en pack*. Against such combinations outsiders are compelled to seek cover under this Court's cloak of justice. The complexities of a case such as this, involving five patents and seven accused devices, are enough to overwhelm the average Court; whereas the patents, if treated separately, would have been relatively simple to "see through."

Defendant's Petition for Writs of Certiorari for the first time presents the Jardine patent in such manner that it may be judicially considered, as patents normally are and should be, on its own merits, *sans* the protecting and concealing influence of group force. We do not ask the Court

to take these cases merely because of concentration of the automobile industry in the Sixth Circuit, but because, compounded with that, is the question of very doubtful validity of the Jardine patent, new or unsettled questions of patent law, the unusual history of the litigation, and its public importance.

CONCLUSION.

It is therefore respectfully submitted that the Petition in these cases, which brings up only the matter of the Jardine patent, should be granted.

Respectfully submitted,

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